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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CENTER FOR BIOLOGICAL DIVERSITY)
 and TURTLE ISLAND RESTORATION)
 NETWORK,)

Plaintiffs,)

v.)

KEN SALAZAR and UNITED STATES)
 FISH & WILDLIFE SERVICE,)

Defendants.)

No. C 10-992 SC

**STIPULATION AND ~~[PROPOSED]~~
 ORDER MODIFYING STIPULATED
 SETTLEMENT AGREEMENT AND
 ORDER OF DISMISSAL**

Stipulation and [Proposed] Order
 Modifying Stipulated Settlement
 Agreement and Order of Dismissal

Pursuant to Civil L.R. 7-12, this Stipulated Settlement Agreement is entered into by and between Plaintiffs Center for Biological Diversity and Turtle Island Restoration Network, and Federal Defendants Ken Salazar, Secretary of the United States Department of the Interior, and the United States Fish and Wildlife Service (collectively “FWS” or “Service”):

WHEREAS, on December 18, 2008, the Service made 12-month findings, pursuant to 16 U.S.C. § 1533(b)(3)(B)(ii), that listing seven penguin species, or subpopulations thereof (collectively the “seven penguin species”) was warranted, and issued a proposed listing regulation for these species pursuant to 16 U.S.C. § 1533(b)(5), 73 Fed. Reg. 77,264 (Dec. 18, 2008); 73 Fed. Reg. 77,303 (Dec. 18, 2008); 73 Fed. Reg. 77,332 (Dec. 18, 2008);

WHEREAS, on March 9, 2010, Plaintiffs filed a Complaint for declaratory and injunctive relief, challenging the Service’s failure, as to the seven penguin species, to issue a final listing determination within one year as required by 16 U.S.C. § 1533(b)(6)(A)(i);

WHEREAS, on June 3, 2010, the Court approved the parties’ Stipulated Settlement Agreement resolving this action, and entered an Order dismissing this case, Doc. No. 8;

WHEREAS, Paragraph 5 of the Stipulated Settlement Agreement and Order provides that this Court may modify the terms of the Order upon good cause shown;

WHEREAS, the parties previously stipulated to one modification of the Stipulated Settlement Agreement and Order, which the Court approved on June 15, 2010 (Doc. No. 10);

WHEREAS, pursuant to the Stipulated Settlement Agreement and Order, the Service timely submitted to the *Federal Register* and issued, on August 3, 2010, a final rule listing the yellow-eyed penguin, white-flippered penguin, Fiordland crested penguin, Humboldt penguin, and erect-crested penguin as threatened species, 75 Fed. Reg. 45,497;

WHEREAS, pursuant to the Stipulated Settlement Agreement and Order, the Service timely submitted to the *Federal Register* and issued, on September 28, 2010, a final rule listing the African penguin as an endangered species, 75 Fed. Reg. 59,645;

WHEREAS, paragraph 3 of the Stipulated Settlement Agreement and Order, as modified, provides that: On or before January 28, 2011, the Service shall submit to the Federal Register a

1 final listing determination, pursuant to 16 U.S.C. § 1533(b)(6)(A)(i), as to its proposal to list the
2 Campbell Plateau portion of the range of the New Zealand/Australia distinct population segment
3 of the southern rockhopper penguin, *Eudyptes chrysocome*;

4 WHEREAS, the Service has been working diligently to meet the deadline established in
5 paragraph 3;

6 WHEREAS, this listing determination involves complex analysis;

7 WHEREAS, the Service needs a limited amount of additional time to complete its
8 analysis and determination regarding the southern rockhopper penguin;

9 WHEREAS, Plaintiffs consent to modification of the Stipulated Settlement Agreement
10 and Order;

11 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS
12 FOLLOWS:

13
14 1. Paragraph 3 of the Stipulated Settlement Agreement and Order, as modified, shall be
15 further modified to read as follows:

16 3. On or before February 18, 2011, the Service shall submit to the *Federal Register* a
17 final listing determination, pursuant to 16 U.S.C. § 1533(b)(6)(A)(i), as to its proposal to
18 list the Campbell Plateau portion of the range of the New Zealand/Australia distinct
19 population segment of the southern rockhopper penguin, *Eudyptes chrysocome*.

20 2. The remaining provisions of the Stipulated Settlement Agreement and Order shall remain
21 in effect and are unchanged by this modification.

22 Dated: January 20, 2011

Respectfully submitted,

23 IGNACIA S. MORENO, Asst. Attorney General
24 SETH M. BARSKY, Section Chief

25
26 /s/ Lawson E. Fite

27 LAWSON E. FITE, Trial Attorney

28 Stipulation and [Proposed] Order
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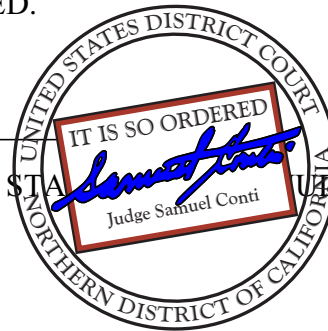
/s/ Catherine W. Kilduff (by LEF, as authorized
1/20/11)

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Attorneys for Plaintiffs

PURSUANT TO STIPULATION, IT IS SO ORDERED.

UNITED STATES JUDGE



Stipulation and [Proposed] Order
Modifying Stipulated Settlement
Agreement and Order of Dismissal

CENTER FOR BIOLOGICAL
DIVERSITY, et al.,

Plaintiffs,

v.

KEN SALAZAR, et al.,

Defendants.

No. C 10-992 SC

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2011, I electronically filed the foregoing
STIPULATION AND [PROPOSED] ORDER MODIFYING STIPULATED SETTLEMENT
AGREEMENT AND ORDER OF DISMISSAL with the Clerk of the Court via the CM/ECF
system, which will send notification of such to the attorneys of record.

/s/ Lawson E. Fite

LAWSON E. FITE